# Ting Yuk Kiong v Mawar Biru Sdn Bhd (Harry Lee Yew Tong, Applicant)

HIGH COURT (JOHOR BAHRU) — COMPANIES WINDING-UP PETITION NO 28-76 OF 1993
ARIFIN J
18 FEBRUARY 1995

***Companies and Corporations*** *— Winding up — Stay of proceedings — Court's discretion to grant stay — Civil suit against petitioner pending — All directors consented to application — Provisional liquidator reported that company was solvent — Whether every member of company must consent to application — Whether current trading activities and financial status of company relevant factors — Companies Act 1965 s 243(1)*

A winding-up petition against Mawar Biru Sdn Bhd ('the company'), a limited company incorporated under the Companies Act 1965 ('the Act'), was filed by a creditor of the company ('the petitioner'). The petition was duly served on the company, and at the hearing, it was ordered that the company be wound up. The company was unrepresented at the hearing. However, four months later, one of the directors and a contributory of the company ('the applicant') made an application for stay of all further proceedings in relation to the winding up of the company, under s 243(1) of the Act. The application was supported by the applicant's affidavit ('the affidavit') which stated that all the company's directors had given their consent to proceed with the application. The absence of representation by the company at the hearing was also explained as being due to miscommunication between the company's staff at its registered office and the directors of the company. The affidavit further disclosed that the company had two pending civil suits against the petitioner and another creditor. The provisional liquidator of the company, who had submitted a report to the court under s 243(2) of the Act ('the report'), recommended that the company was solvent, on the grounds that it still had RM120,000 of cash in hand, and that his fees, the sum due to the petitioner and the other creditor, had already been provided. The question for the court to consider was whether the applicant had made out a case for a stay of the winding up.

**Held**, dismissing the application:

(1) Under the law, the granting of a stay of further proceedings of winding up is a discretionary matter for the court, and the onus is on the applicant to make out a positive case for a stay. In exercising its discretion, the court has to consider the factors and principles which have been established by decided cases.

(2) In order to obtain a stay of the winding-up proceedings, the applicant must convince the court that each member of the company had consented or would otherwise be bound not to

object to it. In the present application, although all the directors of the company had given their consent to the application, both the affidavit and the report were silent regarding the members' consent.

(3) The court was not convinced that the company was solvent. The affidavit did not disclose sufficient information about the current trading activities and general solvency of the company. Further, it appeared that the provisional liquidator did not carry out a proper investigation into the affairs of the company before coming to the conclusion that the company was solvent, as his opinion appeared to be based on the fact that the company had paid the liquidator and its two creditors, and that the company had RM120,000 cash in hand, which did not in any way reflect the solvency of the company. In the report, no reference was made to the company's audited accounts and the principle officers of the company.

(4) In the present case, the fundamental principle that applied was that an insolvent company should be wound up. The state of affairs of the company prompted the court to believe that the company had no assets at the hearing of the petition, and in those circumstances, the court had to make the winding-up order.

**[Bahasa Malaysia summary**

Suatu petisyen penggulungan terhadap Mawar Biru Sdn Bhd ('syarikat tersebut'), yang merupakan suatu syarikat berhad yang diperbadankan di bawah Akta Syarikat 1965 ('Akta tersebut'), telah difailkan oleh seorang pemiutang syarikat tersebut ('pempetisyen'). Petisyen telah disampaikan seperti yang sepatutnya ke atas syarikat tersebut, dan pada pembicaraan petisyen itu, mahkamah telah mengarahkan supaya syarikat tersebut digulungkan. Syarikat tersebut tidak diwakili di pembicaraan itu. Walau bagaimanapun, empat bulan kemudian, seorang daripada pengarah dan penyumbang syarikat tersebut ('pemohon'), telah membuat suatu permohonan untuk penggantungan kesemua prosiding selanjutnya yang berkenaan dengan penggulungan syarikat tersebut, di bawah s 243(1) Akta tersebut. Permohonan itu adalah disokong oleh afidavit pemohon ('afidavit itu') yang menyatakan bahawa kesemua pengarah syarikat tersebut telah memberikan persetujuan mereka untuk meneruskan permohonan itu. Ketiadaan representasi oleh syarikat tersebut di pembicaraan itu juga dijelaskan sebagai diakibatkan oleh kesilapan dalam komunikasi di antara pekerja di pejabat berdaftar syarikat itu dan pengarah syarikat itu. Afidavit itu juga mendedahkan bahawa syarikat itu mempunyai dua guaman sivil yang belum selesai lagi terhadap pempetisyen dan seorang lagi pemiutang. Penyelesai sementara syarikat itu, yang telah mengemukakan suatu laporan kepada mahkamah di bawah s 243(2) Akta tersebut ('laporan itu'), yang mengesyorkan bahawa syarikat itu adalah solven, atas alasan bahawa

ia masih mempunyai wang tunai dalam tangan sebanyak RM120,000, dan bahawa feenya, jumlah yang terhutang kepada pempetisyen dan pemiutang yang lain telahpun disediakan. Soalan yang harus dipertimbangkan oleh mahkamah ialah sama ada pemohon telah menunjukkan kes yang mencukupi untuk penggantungan penggulungan tersebut.

**Diputuskan,** menolak permohonan itu:

(1) Di bawah undang-undang, pemberian penggantungan prosiding penggulungan selanjutnya ialah suatu perkara budi bicara bagi mahkamah, dan pemohon adalah bertanggungjawab untuk menunjukkan suatu kes yang positif untuk penggantungan. Dalam menjalankan budi bicara tersebut, mahkamah harus mempertimbangkan faktor dan prinsip yang telah dimantapkan oleh kes-kes yang telah diputuskan.

(2) Untuk mendapatkan penggantungan prosiding penggulungan, pemohon hendaklah meyakinkan mahkamah bahawa setiap ahli syarikat tersebut telah bersetuju, atau sebaliknya, adalah terikat supaya tidak menentang penggantungan itu. Dalam permohonan ini, sungguhpun kesemua pengarah syarikat tersebut telah memberikan persetujuan mereka berkenaan dengan permohonan itu, kedua-dua afidavit dan laporan itu tidak menyatakan apa-apa berkenaan dengan persetujuan ahli tersebut.

(3) Mahkamah adalah tidak yakin bahawa syarikat tersebut adalah solven. Afidavit itu tidak mendedahkan maklumat yang mencukupi mengenai aktiviti perniagaan sekarang dan kemampuan bayar syarikat tersebut. Juga, nampaknya penyelesai sementara tidak menjalankan suatu penyiasatan yang sempurna tentang hal-ehwal syarikat tersebut sebelum beliau mencapai keputusan bahawa syarikat tersebut adalah solven kerana pendapatnya nampaknya adalah berdasarkan hakikat bahawa syarikat tersebut telahpun membayar fee beliau, dan kedua-dua orang pemiutangnya, dan bahawa syarikat tersebut mempunyai wang tunai dalam tangan sebanyak RM120,000, yang tidak mencerminkan kemampuan bayar syarikat itu. Dalam laporan itu, tiada rujukan yang telah dibuat kepada akaun teraudit syarikat tersebut dan pegawai utama syarikat tersebut.

(4) Dalam kes ini, prinsip asas yang terpakai ialah bahawa syarikat yang tak solven harus digulung. Keadaan hal-ehwal syarikat tersebut telah menyebabkan mahkamah percaya bahawa syarikat tersebut tidak mempunyai aset semasa pembicaraan petisyen itu, dan dalam keadaan itu, mahkamah terpaksa membuat perintah penggulungan.]

[*Editorial Note*: The applicant has appealed to the Court of Appeal vide Civil Appeal No J–02–60–95.]

A **Notes**

For cases on stay of winding-up proceedings, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 560–561.

**Cases referred to**

B *A Private Company, Re* [1935] NZLR 120 (folld)
*Bank of Queensland Ltd, Re* (1870) 2 QSCR 113 (folld)
*Calgary and Edmonton Land Co Ltd (In Liquidation), Re* [1975] 1 All ER 1046; [1975] 1 WLR 355 (folld)
*Dalta Homes Pty Ltd, Re* [1972] 2 NSWLR 22 (folld)
C *Krextile Holdings Pty Ltd v Widdows* [1974] VR 689 (folld)
*Mascot Home Furnishers Pty Ltd, Re* [1970] VR 593 (folld)
*South Barrule State Quarry Co, Re* (1969) LR 8 Eq 688 (folld)
*Telescriptor Syndicate Ltd, Re* [1963] 2 Ch 174 (folld)
*Warbler Pty Ltd, Re* (1982) 6 ACLR 526 (folld)

D **Legislation referred to**

Companies Act 1965 ss 218(2)(a), 243(1), (2),
Companies Act 1948 s 256(1) [UK]

*Rosita Yeo* (*Yeo & Co*) for the applicant.
E *Yap Siong Cheng* (*Arthur Lee & Co*) for the respondent.
*M Jegatheesan* for the Official Receiver

**Arifin J**: This application by way of notice of motion (encl 17) is made by Mawar Biru Sdn Bhd ('the company') for an order that:

F (a) all further proceedings in the winding up of the company be stayed absolutely; alternatively

(b) all proceedings in relation to the winding up of the company be stayed on such terms and conditions as this honourable court thinks fit.

G The company was incorporated on 9 November 1984, as a limited company under the Companies Act 1965 with its registered office at S2–36 and S2–37 Wisma Abad, Century Garden, Johor Bahru. The paid-up capital of the company is RM325,004, as against the authorized capital of RM2m divided into 2,000,000 shares of RM1 each.

H The main objects for which the company was established are as follows:

(a) to carry on the business of an investment company and for that purpose to acquire and hold either in the name of the company or in that of any nominee, shares, stock, debentures, notes, bonds or
I securities by original subscription, purchase, exchange and to subscribe for the same subject to such terms and conditions (if any) as may be thought fit. Provided always that no surplus arising upon any such

sale shall be available for distribution through the profit and loss account; and

(b) to buy, take on lease, or otherwise acquire any real and personal property, lands, buildings, houses, apartments, condominiums, flats, rights and assessments of every kind which the company may think necessary or convenient for the purposes of its business and to issue and allot fully or partly paid shares in the capital of the company in payment or part payment of any real or personal property purchased or otherwise acquired by the company or any services rendered to the company.

Provided always that no surplus arising upon any such sale shall be available for distribution through the profit and loss account and other objects set forth in the memorandum of association thereof.

On 21 July 1993, a petition for winding up the company was filed by Ting Yuk Kiong ('the petitioner'), who was a creditor of the company. In para 5 of the petition, it is alleged that the company is indebted to the petitioner in the sum of RM36,057.21 being the taxed costs awarded to the petitioner in respect of originating summons No 24–677 of 1989 in the High Court of Malaya at Johor Bahru, and appeal No 03–73 of 1990 in the Supreme Court in Kuala Lumpur.

The statutory notice of demand pursuant to s 218(2)(a) of the Companies Act 1965, was served on 3 June 1993, by leaving it at the registered office of the company. The said notice of demand required the company to pay to the petitioner's solicitors the said sum of RM36,057.21 within 21 days from the service of the notice on the company, failing which it would be deemed to be unable to pay its debts and appropriate action would be taken for winding it up. The company had neglected and failed to pay the debt after a lapse of the specified period of 21 days. The petitioners filed the petition for winding up the company on the ground that it was unable to pay its debts. The petition was duly served on the company on 16 August 1993, on the Official Receiver on 10 August 1993, and on the Registrar of Companies on 12 August 1993.

The petition was heard on 22 February 1994, when it was ordered by the court:

(i) that the company be wound up by the court under the provisions of the Companies Act 1965;

(ii) that the Official Receiver Malaysia be appointed as provisional liquidator of the company; and

(iii) that the petitioner be allowed the costs of and incidental to the winding up which is to be taxed by the proper officer of the court and paid by the liquidator out of the assets of the company.

At the hearing of the petition, the company was not represented by any counsel although the petition was duly served on it.

Some four months later, ie on 21 June 1994, the present application for stay of all further proceedings in relation to the winding up of the company was filed by Harry Lee Yew Tong ('the applicant'), who is one

of the directors and a contributory of the company. The application for stay was made under s 243(1) of the Companies Act 1965 which reads as follows:

> At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

This section is substantially similar to s 256(1) of the English Companies Act 1948. In *Re Calgary and Edmonton Land Co Ltd (In Liquidation)* [1975] 1 All ER 1046; [1975] 1 WLR 355, Megarry J had occasion to refer to s 256(1) and emphasized [1975] 1 All ER 1046 at p 1050; [1975] 1 WLR 355 at p 358:

> Under s 256 itself the court 'may ... on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed' make an order for the stay 'on such terms and conditions as the court thinks fit'. Quite apart from any authority ... this language seems to me to make it abundantly clear that the jurisdiction is discretionary, and that it lies on those who seek a stay to make out a sufficient case for it.

Under the law, therefore, the granting of a stay of further proceedings of the winding up is a discretionary matter for the court, and the onus is on the applicant to make out a positive case for a stay. In exercising its discretion, the court has to consider certain factors and would act on certain principles which have been established by decided cases. In *Re Warbler Pty Ltd* (1982) 6 ACLR 526, the following principles are enumerated:

(a) The granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out a positive case for a stay: *Re Calgary and Edmonton Land Co Ltd (In Liquidation)*.

(b) There must be service of notice of the application for a stay on all creditors and contributories and proof of this (*Re South Barrule State Quarry Co* (1969) LR 8 Eq 688, *Re Bank of Queensland Ltd* (1870) 2 QSCR 113 referred to).

(c) The nature and extent of the creditors must be shown and whether or not all debts have been discharged. (*Krextile Holdings Pty Ltd v Widdows* [1974] VR 689 at p 694; *Re Dalta Homes Pty Ltd* [1972] 2 NSWLR 22 at p 26 referred to).

(d) The attitude of creditors, contributories and the liquidator is a relevant consideration. (*Re Calgary and Edmonton Land Co Ltd (In Liquidation)* referred to).

(e) The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding up is sought. (*Re A Private Company* [1935] NZLR 120: *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593 at p 598 referred to).

(f) If there has been non-compliance by the directors with their statutory duties as to the giving of information or furnishing a statement of affairs, a full explanation of the reasons and circumstances should be given. (*Re Telescriptor Syndicate Ltd* [1963] 2 Ch 174 referred to).

(g) The general background and circumstances which led to the winding-up order should be explained. (*Krextile Holdings Pty Ltd v Widdows* referred to).

(h) The nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to 'commercial morality' or the 'public interest'. (*Krextile Holdings Pty Ltd v Widdows*, *Re Dalta Homes Pty* referred to).

In *Re Calgary and Edmonton Land Co Ltd (In Liquidation)*, the court had to decide on an application for stay of the winding-up proceedings of the company. The application was dismissed and it was held, inter alia:

> (1) the court would in normal circumstances, generally exercise its discretion to grant a stay only where the applicant showed: (a) that each creditor had either been paid in full or that satisfactory provision for him to be paid in full was to be made, or that he consented to the stay or was otherwise bound not to object to it; (b) that the liquidator's position was fully safeguarded, either by paying him the proper amount of his expenses or sufficiently securing payment; and (c) that each member either consented to the stay, or was otherwise bound not to object to it, or there was secured to him the right to reserve all that he would have received if the winding up had proceeded to its conclusion.

I now consider whether the applicant has succeeded in making out a sufficient case for a stay of the winding up. The application is supported by an affidavit affirmed by the applicant himself. The applicant says that he is one of the directors and a contributory of the company. He explains the absence of any representation by the company at the hearing of the petition for winding up on 22 February 1994 was 'due to miscommunication between the staff at Mawar Biru Sdn Bhd's registered office, and the director of Mawar Biru Sdn Bhd' (para 4). In para 5 of the affidavit, it is stated that the company had paid to the Official Receiver who is the provisional liquidator the sum of RM72,116.49, being the sum due to the petitioner amounting to RM36,057.21, and to another creditor, one Lim Kai Chew, amounting to RM36,059.28.

Paragraph 7 of the affidavit discloses that the company has two civil suits, namely, civil suit No 23–241 of 1989 and civil suit No 23–242 of 1989, against Lim Kai Chew and the petitioner, respectively, which are still pending. The applicant was advised and verily believes that there are merits in the company's claim in these suits. In any event, the prosecution of these cases would be conducted by the provisional liquidator. The affidavit, to my mind, does not disclose sufficient information about the current trading activities and position and general solvency of the company that could assist the court in deciding whether to grant the stay of the winding-up proceedings. In my anxiety to find out more about the current

A trading activities of the company and its financial status, I resorted to s 243(2) of the Companies Act 1965 which is as follows:

> On any such application the Court may, before making an order, require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.

B I adjourned the hearing and directed the provisional liquidator to compile and file a report in respect of the current financial status and activities of the company. The report dated 27 September 1990 was filed; the relevant portions of which are reproduced below:

> 4 Pernyataan hal-ehwal bagi syarikat telah dikemukakan oleh seorang
> C pengarah syarikat En Lee Yew Tong kepada pegawai penerima pada 21 April 1994. Aset-aset dan liabiliti-liabiliti yang dicatitkan dalam pernyataan tersebut adalah seperti berikut:
>
> 4.1 Asset
>
> Wang tunai dalam tangan — RM120,000
>
> D 4.2 Liabiliti
>
> Pemiutang tak bercagar — RM72,114.42.
>
> 5 Pada 19 April 1994, En Lee Yew Thong (contributory) telah membayar RM72,116.49 kepada pegawai penerima untuk menjelaskan hutang-hutang syarikat dan RM1,300 pada 27 Jun 1994 untuk
> E menampung kos pentadbiran.
>
> 6 Sebelum prosiding penggulungan ini terdapat dua tindakan guaman difailkan di mahkamah yang mulia ini oleh syarikat ini. Kes-kes tersebut masih belum diputuskan oleh mahkamah dan didaftarkan sebagai guaman No 23–241 tahun 1989 terhadap Lim Kai Chew (pemiutang) dan guaman No 23–242 tahun 1989 terhadap Ting Yuk Kiong (f)
> F (pempetisyen).
>
> 7 Kesemua pengarah-pengarah syarikat tersebut telah menghadiri diri di pejabat pegawai penerima di Johor Bahru pada 22 Ogos 1994, dan mereka bersetuju supaya En Lee Yew Tong meneruskan permohonan untuk penggantungan prosiding penggulungan.
>
> G 8 Setakat ini pegawai penerima masih belum menerima apa-apa bukti hutang daripada mana-mana pihak.
>
> 9 Pegawai penerima mempunyai wang yang mencukupi untuk membayar segala hutang sepertimana yang dicatitkan dalam penyataan hal ehwal syarikat tersebut.
>
> 10 Pada pendapat pegawai penerima dan pelikuidasi, syarikat ini adalah
> H solven.
>
> 11 Memandangkan syarikat ini mampu membayar hutangnya, pegawai penerima dan pelikuidasi berpendapat bahawa syarikat ini patut dibenarkan untuk hidup semula dan dapat meneruskan kes-kes guaman yang telah mereka mulakan di mahkamah.

I It is evident, therefore, from the report that the applicant as a director and contributory of the company had made payment to the provisional liquidator to settle the company's liability to the petitioner and to another unsecured creditor. The provisional liquidator's fees and expenses had also been

paid. All the directors of the company had given their consent on 22 August 1994, for the applicant to proceed with the application. But no mention is made whether members of the company had consented to the stay or were otherwise bound not to object to it. The affidavit in support of the application is also silent on this issue. The consent of each member to the stay is essential: (*Re Calgary*'s case). The applicant has failed to convince this court that each member of the company has consented or would otherwise be bound not to object. It is not sufficient that the creditors had been paid in full and that the provisional liquidator's fees and expenses have been provided for. This does not in any way reflect the solvency of the company. The payment was made by the applicant who came to the rescue of the company.

The provisional liquidator further says in his report that the company is solvent and recommends that the winding up of company be stayed. I am not convinced that the company is solvent, as the provisional liquidator appears to me to have expressed his opinion that the company is solvent based on the mere fact that the company had paid its two creditors and that the fees and expenses of the provisional liquidator has been provided for and the fact that the company had RM120,000 cash in hand. The report categorically states that the company's only asset as on 13 April 1994 is cash in hand in the sum of RM120,000. No proper account is produced to indicate who is keeping the money. I cannot imagine why such a large sum of money is not kept in the bank, and it is indeed hard to believe that the company has that amount of cash in hand, and yet did not settle its liabilities to the petitioner until after the winding-up order of the company was ordered by the court. This state of affairs does not augur well for the company and this prompted me to believe that the company is struggling to settle its debts and it is insolvent, as at the time when the winding-up order was made the company had no assets.

It appears to me that the report does not reflect that the provisional liquidator has carried out a proper investigation into the affairs of the company, as he has not stated therein that he has made references to the company's books or audited accounts or made consultations with the principle officers of the company such as the auditor and the secretary. This, to my mind, he has to do before coming to a conclusion that the company is solvent.

Under the circumstances of the case, it is my finding that the company is insolvent and based on the fundamental principle that an insolvent company should be wound up (*Re Mascot Home Furnishers Pty Ltd* [1970] VR 593), it is my considered opinion that the winding-up petition of the company should not be stayed. For the reasons stated above, I rule that the applicant has not made out a case for a stay of the winding-up proceedings of the company.

The application is therefore dismissed with costs.

*Order accordingly.*

Reported by Isabel Liong